BEFORE THE CANADIAN RADIO-TELEVISION AND TELECOMMUNICATIONS COMMISSION

Submission to Telecom Notice of Consultation CRTC 2009-716:
Review of CRTC costs award practices and procedures

Reply comments of the Samuelson-Glushko Canadian Internet Policy and Public Interest Clinic (CIPPIC)

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a) a) Introduction

1. The Commission's understanding of the public interest is enhanced when a diversity of views are represented in a proceeding. It cannot carry out its mandate without such an understanding. To this end, the *Telecommunications Act* grants the commission a very wide discretionary power to award, and require payment of costs.[1] The Applicants effectively seek to curtail the Commission's discretion by imposing a rigid set of guidelines to govern the process. The proposed guidelines will put a chill on public discourse before the Commission by raising the bar on intervenor eligibility and creating additional layers of paperwork for all involved with little potential for cost savings on the part of regulated companies in return. While such radical changes might be considered necessary in an environment of persistent abuse, or where millions of dollars are paid out annually as is the experience with energy regulators in California and Quebec, they are unwarranted in CRTC hearings.

b) Current procedures allow Commission to meet objectives

2. The current practices and procedures related to the award and payment of costs meet the needs and objectives of telecommunications regulation in Canada; needs which are different from those of needs of provincial or state energy regulators. In particular, they allow the Commission to meet the objective of informed participation in public hearings while restricting costs to responsible interveners who represent a group or class of subscribers and contribute to a better understanding of the issues. The Applicants call for a dramatic shift in the Commission's costs procedures and rules in order to "provide much needed certainty to claimants, respondents as well as outside counsel and consultants" on the standard practices of "any reasonable counsel".[2] The need for this 'dramatic shift' is signaled by "recent excessive costs claims", and in response the Applicants suggest a comprehensive set of rigid and draconian new procedures and rules based on an examination of "various regulatory bodies" with purportedly similar costs award

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[1] *Telecommunications Act*, s. 56; *Action Réseau Consommateur, the Public Interest Advocacy Centre and the National Anti-Poverty Organization application for costs - Aliant Telecom Part VII Application on Late Payment Charges* (25 September 2002), Telecom Costs Order CRTC 2002-11, <http://www.crtc.gc.ca/eng/archive/2002/co2002-11.htm>, para. 16.

[2] Barrett Xplore Inc. Bell Aliant Regional Communications, Limited Partnership, Bell Canada, Cogeco Cable Inc. Northwestel Inc., Rogers Communications Inc. Saskatchewan Telecommunications, Shaw Communications Inc., Télébec, Société en commandite and TELUS Communications Company, *Part VII Application to request a review of the procedures for the awarding of costs*, 25 September 2009, <http://www.crtc.gc.ca/public/partvii/2009/8657/b55_200913138/1277526.zip> [Application] at para. 8.

objectives.[3] Yet the Applicants are only able to point to one recent proceeding as demonstrative of these "excessive costs claims" – Telecom Public Notice CRTC 2008-10 ("PN 2008-19").

3. Viewed in their proper context, neither costs claims emerging from PN 2008-19, nor the practices of other tribunals relied upon by the Applicants justify the draconian rules proposed. That $430 thousand was claimed in PN 2008-19, a policy-driven hearing that established a new legal and factual framework for future decisions related to internet traffic management, is a sign that the current system works. The examples from other tribunals relied upon by the Applicants confirm, rather than challenge, the efficacy of existing CRTC costs practices.

4. The Applicants point to Ofcom, for example, as a Telecom body that does not offer public interest participation incentives at all.[4] Ofcom consultations, however, are non-adversarial and lack the quasi-judicial character of CRTC tribunal proceedings. Comments are collected, Ofcom gathers its own evidence, and parties do not typically have an opportunity to directly confront and challenge submissions of other parties as there are no reply stages.[5] In this respect, what the Applicants are proposing is less a shift in the Commission's costs proceedings and more a monumental shift in substantive Commission practice.

5. Further, in their proposed changes, while the Applicants refer to a number of bodies, their proposed changes rely primarily on the procedures of two specific regulators. An examination and comparison of the experiences of these two regulators will demonstrate the relative efficiency of the Commission's existing practices and procedures in relation to costs. As will be illustrated below, Commission procedures cannot be compared to either of these regulators for two reasons. First, the Commission operates on a much smaller scale than either the Régie de l'énergie Quebec (the "Régie") or the California Public Utilities Commission ("CalPUC"). Consequently, the total value of the claims filed with the Commission is a fraction of the total value of the claims filed at either the Régie or CalPUC. Second, the number of claimants who file for costs from either the Régie or CalPUC far exceed the number who claim costs at the Commission. In addition, the

[3] *Ibid*. at paras. 2, 7.
[4] *Ibid*., at para. 9.
[5] Ofcom Consultation Guidelines (November 2007), <http://www.ofcom.org.uk/consult/consult_method/ofcom_consult_guide>.

experience of these two tribunals illustrates better than all else the relatively reasonable quantum of costs in CRTC proceedings generally, and even in PN 2008-19 specifically.

i. Régie de l'énergie Quebec

6. Over a three month span in late 1998, the Régie ordered a single regulated company to pay twenty claims whose total exceeded $1.5 million. More specifically, in August 1998, eleven interveners claimed over $1.6 million in relation to D-98-129.[6] Upon review, the Régie ordered Hydro-Quebec to pay over $1.1 million. Two months later, in October 1998, nine interveners claimed over $553 thousand in relation to D-98-169.[7] In the end, the Régie ordered Hydro-Quebec to pay over $420 thousand. Regardless of how the Commission decides to allocate the $430, 943 claimed by six intervenors in Telecom Public Notice CRTC 2008-19, no single regulated company will bear the same burden as did Hydro-Quebec.

7. According to l'Union des Consommateurs, between 2000 and 2004, annual costs awards at the Régie on average exceeded $2 million. This increased to $2.9 million annually for the years 2004-2008.[8]

ii. California Public Utilities Commission

8. In 2009, CalPUC issued sixty-five decisions awarding intervenor compensation. The total annual value exceeded US $7.2 million; the average award exceeded US $100 thousand.[9] In contrast, the Commission issued twenty-four costs orders totaling approximately $300 thousand.[10] This represents less than 5% of the amount of compensation ordered by CalPUC. The average award issued by the Commission in 2009 was approximately $13 thousand.

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[6] *Décision sur le paiement des frais des intervenants*, D-98-129, R-3398-98, 2 décembre 1998, Tableau 1 <http://www.regie-energie.qc.ca/audiences/decisions/annexes.pdf> [D-98-129]

[7] *Décision sur le paiement des frais des intervenants*, D-98-169, R-3395-97, 21 décembre 1998<http://www.regie-energie.qc.ca/audiences/decisions/ann169.pdf> [D-98-169]

[8] Union Des Consommateurs, *Observations - Avis de consultation de télécom CRTC 2009-716 – Examen des pratiques et des procédures du CRTC en Matière d'adjudication de frais*, January 2010, para. 18 [UdC Observations]

[9] See Appendix A.

[10] The Consumers Groups, *Comments of the Consumers' Association of Canada, Canada Without Poverty (formerly the National Anti-Poverty Organization) and the Public Interest Advocacy Center*, 22 January 2010, [Consumer Groups Comments] Appendix 1.

9. These two examples illustrate that while claims filed in PN 2008-19 are higher than those in past Commission proceedings, when considered in relation to other regulatory bodies they are eminently reasonable. The annual sum of costs claimed at the Commission is a fraction of those granted at the Régie or CalPUC. Average claims at the Commission are much less than at the Régie or CalPUC. Even the average claim in PN 2008-19, approximately $71 thousand, is well below the $78 thousand[11] and US $100 thousand[12] granted on average at the Régie or CalPUC, respectively. And PN 2008-19 was exceptional by Commission standards for a number of reasons.[13] To put these values in a broader context, US $100 thousand was cited as the minimum necessary to cover attorney fees for a typical intervention in a major Federal Trade Commission or Federal Communications Commission proceeding – in 1972.[14]

10. In addition, Commission hearings, even complex ones such as PN 2008-19, simply do not have the same number of claimants as the Régie de l'énergie Quebec. In 2009 the Commission issued twenty four costs orders, a figure slightly higher than the average of about twenty over the last five years. In contrast, CalPUC issued sixty-five decisions awarding costs in 2009. Typically three or four interveners claim costs per hearing, though on occasion that figure rises to six or eight.[15] The two hearings that prompted the Régie's November 1998 review had nine and eleven recipients of cost awards, respectively. The Régie identified the number of interveners and number of applications for costs as contributing factors to the large cost awards.[16] The current practices and procedures have allowed the Commission to strike a balance which allows for enough informed participation to allow for a diversity of perspectives to be presented while at the same time being cost efficient.

[11] Based on D-98-129 and D-98-169 where $1,140,052 and $420,815 was ordered to be paid to 20 intervenors.
[12] Appendix A.
[13] Samuelson-Glushko Canadian Internet Policy and Public Interest Clinic, *Initial comments of the Samuelson-Glushko Canadian Internet Policy and Public Interest Clinic*, 22 January 2010, [CIPPIC Initial comments]
[14] Ernest Gellhorn, "Public Participation in Administrative Proceedings" (1972) 81 Yale L.J. 359 at 394; Roger Cramton, "The Why, Where and How of Broadened Public Participation in the Administrative Process" (1972) 60 Geo. L.J. 525 at 538.
[15] See for example references to PN 2008-19 or PN 2008-8 in the Consumer Groups Comments, Appendix 1.
[16] *Audience générique sur les frais des intervenants*, D-98-127, R-3412-98, 25 novembre 1998, p. 2; see also UdC Observations , para 20.

11. The unique experiences of these two regulatory bodies does indeed justify the need for incentives such as those sought by the Applicants. They wish, for example, to better inform public interest counsel on how to participate responsibly in proceedings.[17] They wish to encourage collaboration among public interest intervenors to avoid duplication.[18] The $2.2 million in costs claimed by twenty intervenors in the two 1998 proceedings that prompted the Régie to overhaul its costs structure might demonstrate a need for such incentives. The US $100 thousand that was on average awarded to each of the sixty-five costs claimants in 2009 by CalPUC, in addition, is of such a magnitude that might warrant onerous procedures to ensure costs are held in check. CIPPIC has seen no indication that such incentives are necessary in Commission proceedings. Certainly the $430 thousand claimed by six intervenors in one proceeding – an exceptional and isolated case by all CRTC standards – appears eminently reasonable in comparison.

12. More to the point, and as will be discussed below, onerous procedures such as those now employed in the Régie and CalPUC and requested by the Applicants are ill-suited in scope to Commission proceedings. The resultant administrative burdens are great and out of proportion to CRTC costs claims. Adopting these procedures is further likely to deter possible interveners from participating fully or at all in Telecom proceedings. Further, introducing a more rigid framework that reduces the scope of the Commission's discretion[19] will exacerbate existing disparities between public interest intervenors and the regulated companies. This is all likely to chill the discourse that is essential for the Commission to fulfill its mandate.

c) Proposed changes increase administrative burden with little reduction in overall cost

13. The changes proposed by the Applicant's may facilitate projecting expenses but are unlikely to cut costs. The Union des Consommateurs illustrates this in relation to the measures

[17] Application, at para. 8.
[18] *Ibid*.
[19] Several references to the taxation officers' general discretion are eliminated from the proposed guidelines. Barrett Xplore Inc. Bell Aliant Regional Communications, Limited Partnership, Bell Canada, Cogeco Cable Inc. Northwestel Inc., Rogers Communications Inc. Saskatchewan Telecommunications, Shaw Communications Inc., Télébec, Société en commandite and TELUS Communications Company*, Comments - Review of CRTC costs award practices and procedures*, 22 January 2010 <http://www.crtc.gc.ca/public/partvii/2009/8657/c12_200915770/1346592.zip> [Applicant's Comments], Appendix A – Proposed Guidelines

applied by the Régie. In fact rather than reduce costs, they increased by 40% from the period between 2000 and 2004 to the period between 2004 and 2008.[20] The Commission, interveners and regulated companies will all face an increased administrative burden which will tax financial and human resources. The Applicants' proposal will augment the administrative burden in three ways. First, by adding an additional step to the review process, it doubles the number of submissions parties will need to prepare and that the Commission will have to review. Second, the proposed procedure broadens the scope of information collected which will result in longer submissions and require longer decisions. Finally, coordinating joint submissions creates additional administrative work not presently covered by the current framework.

14. The present costs awarding procedure is a simple one step, *a posteriori* procedure. The party seeking costs files a written application, the regulated company is given an opportunity to respond, and the applicant can reply. The Applicants propose adding a preliminary step. Parties seeking costs would have to file a comprehensive notice of intent to participate[21] in addition to an application once the proceedings are completed. This would double the administrative burden. Each step would have an application, a response, a reply as well as the determination by the Commission, and possible subsequent review and vary procedures – none of which will address the substantive concerns the Commission is attempting to investigate in the main proceedings in question.

15. The proposed guidelines also broaden reporting and disclosure requirements. The most significant addition is the requirement to submit a budget with detailed cost estimates broken down per issue the intervener wishes to address.[22] The Applicants propose a further step for parties seeking to claim costs for expert witnesses or consultants.[23] Potential cost recipients would have to disclose sources and amounts of financial assistance received,[24] as well as their legal nature, mission and goals, board members, number of members and mandate.[25] Longer submissions and decisions will necessarily result. The length of decisions awarding intervenor

[20] UdC Observations , para. 18.
[21] Applicant's Comments, Appendix A – Proposed Guidelines, Rule 7
[22] *Ibid.,* Rule 7(c).
[23] *Ibid.,* Rule 7(g).
[24] *Ibid.,* Rule 7(d); Applicant's Comments, para. 20
[25] *Ibid.,* Rule 7(f).

compensation issued by the CalPUC supports this concern. In 2009, the average CalPUC decision was 20 pages long. This is significantly longer than the Commission's current cost orders.

16. Coordination between parties who appear before the Commission, regulated companies and interveners alike, should be encouraged. The Commission's current procedures place an onus on all parties "to find ways of eliminating unnecessary costs and delays" and to reduce duplication of substantive contributions.[26] That said, requiring parties who have similar perspectives in the outcome of an issue but not necessarily the same view on how to reach that outcome to file joint submissions does not serve the Commision well. As will be discussed further below, the Commission must distinguish between duplication of issues as opposed to duplication of substance. Further, requiring parties who operate in different geographical regions, have a different working language or who only have a narrow band of overlap in their views is likely to increase rather than reduce costs.[27]

17. Adopting the proposed changes would depart from the Policy Direction, which requires the Commission to adopt streamlined processes that would better enable it to act in a more efficient, informed and timely manner.[28] However, should the Commission choose to adopt the suggested *a priori* eligibility procedure, the threshold for such a budget should be set at $100,000[29] rather than $10,000 as suggested by the Applicants.[30] This would alleviate excess administrative burden for interventions where the cost incurred in preparing and defending the additional documentation is likely to be out of proportion to that expended on the procedure itself. This would deter claimants with important perspectives to share but limited administrative resources.

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[26] *CRTC Procedures and Practices in Telecommunications Regulation* (23 May 1978), Telecom Decision CRTC 78-4, Volume 4, Part 1, [CRTC 78-4], p. 125. With respect to duplication, see CRTC, *Guidelines for the Taxation of Costs*, as revised April 24, 2007, at para. 11(c).
[27] CIPPIC Initial comments, paras. 33, 35.
[28] Governor in Council, Order Issuing a Direction to the CRTC on Implementing the Canadian Telecommunications Policy Objectives, SOR/2006-355, December 14, 2006, s.1(c)(iv)
[29] As suggested by The Consumer Groups, Consumer Groups Comments, paras. 52-54.
[30] Applicant's Comments, para. 41.

18. Finally, to ensure the complexity of costs award claims, does not deter public interest participation, the Commission must consider whether resources are available to provide assistance to parties unfamiliar with the process. CalPUC staffs two offices, one in San Francisco and another in Los Angeles,[31] that provide procedural information and advice to those wanting to participate in formal proceedings. This includes information about the Intervenor Compensation Program.[32]

d) Raises bar on Intervener Eligibility

19. The present streamlined practices and procedures strike the appropriate balance between public participation and accountability. The Applicants propose changes that would raise the bar on intervener eligibility and effectively put cost awards out of the reach of many potential intervenors. The Commission presently benefits from the submissions of a manageable number of intervenors; implementing more stringent standards will only serve to discourage parties from participation. Given the relatively low number of interveners, any decrease in participation will naturally reduce the diversity of discourse and frustrate the fulfillment of the Commission's mandate.

20. Three significant departures from present practices and procedures are especially problematic. First, as a precondition to eligibility, claimants must demonstrate "significant financial hardship".[33] Second, once eligibility has been secured, claimants must demonstrate they made a "substantial contribution". Finally, as noted in our last submission, it is important to avoid conflating duplication of issues with duplication of substance. Each of these additions are assessed below on their merits in light of the purpose of costs awards in Telecommunications procedures. These awards are intended, ultimately, to ensure the Commission is fully informed of the issues before it. This means ensuring public interest interevenors – who have no direct financial interest in such proceedings but rather intervene, in the public interest – are not deterred from doing so due to a general lack of funding. It also means facilitating cost recovery for efforts expended, as long as – and only as long as – such efforts have resulted in a better understanding

[31] The CPUC Intervenor Compensation Program, <http://www.cpuc.ca.gov/PUC/IntervenorCompGuide/>
[32] Public Advisor's Office, <http://www.cpuc.ca.gov/PUC/aboutus/Divisions/CSID/Public+Advisor/>
[33] Applicant's Comments, para. 20.

of the issues by the Commission. It is not, however, a reward system, where intervenors are rewarded only if and to the extent their positions are adopted.

21. The Consumer Groups provide a detailed analysis of the proposed shift to "significant financial hardship" and "substantial contribution" in their reply.[34] CIPPIC generally agrees with the Consumer Groups analysis and conclusions. In addition, CIPPIC makes the following remarks.

i) "Significant financial hardship"

22. The "significant financial hardship" requirement proposed by the Applicants would, in itself, impose significant hardship on public interest intervenors such as CIPPIC. The proposal does not reflect the reality of CIPPIC's operations and, if adopted, would make its participation in Commission proceedings difficult. While, as the Applicants note, a portion of CIPPIC's mandate includes general advocacy on legal issues raised by new technologies,[35] this mandate is not limited to CRTC Telecom hearings. CIPPIC funding is often earmarked for specific advocacy projects. Contributions of general application are infrequent. Further, such donations, along with University contributions (largely in-kind) are typically spent on general overhead, student education and public outreach or other advocacy activities. Such funding is not sufficient to cover all CIPPIC activities and costs.

23. Participation in proceedings before the Commission is resource intensive and not typically covered by other funding sources. CIPPIC has in the past and continues to rely on costs awards – from the Commission and elsewhere – as a means of cost recovery and a necessary mechanism for the clinic's continued existence. While, at the outset of a hearing, it may have sufficient resources to secure its participation in that specific hearing, time expended on that proceeding would be diverted from other activities that would often have a viable cost recovery mechanism. The opportunity cost of having to doing so without such a mechanism will severely impede its ability to carry out its mandate generally. When deciding whether and to what extent CIPPIC will participate in a proceeding or project, the importance of the issues at stake is

[34] Consumer Groups reply to be filed Feb 2010.
[35] Applicant's Comments, para. 20.

foremost in its calculations. That being said, CIPPIC must also account for funding realities when deciding how to allocate its time and resources.

24. Other organizations such as OpenMedia.ca (formerly the Campaign for Democratic Media), often CIPPIC's client in internet related proceedings, would find it equally if not more prohibitive to secure lasting participation in such proceedings without cost recovery. Open Media was the driving force behind the SaveOurNet.ca coalition – a grassroots organization geared towards protecting an open internet. It is a non-profit advocacy organization, however, and grassroots funding secured through SaveOurNet.ca, a charity, cannot be used for advocacy purposes. Current Commission cost recovery mechanisms allow it to recoup travel expenses and to secure funding spent on experts.

25. However, as mentioned in CIPPIC's initial comments to this consultation, the Commission's practice of restricting cost recovery for time spent by claimants such as Open Media is already an impediment to its continued participation in such proceedings.[36] Far from adding onerous and time consuming reporting requirements such as those proposed in section 7(d) of the Applicants' proposed guidelines, the Commission should instead modify its rules to as to allow such entities to reclaim time investments in order to better secure lasting, durable participation of such entities.

ii) "Substantial contribution"

26. Two points should be elaborated upon in relation to the proposed requirement to demonstrate a "substantial contribution". First, the way that the CalPUC applies "substantial contribution" should be clarified. Second, the strict interpretation of "substantial contribution" proposed by the Applicants[37] would result in a shift to an adversarial model for costs adjudication

[36] CIPPIC Initial comments, note 13.
[37] The suggestion that claimants who initiate a Part VII proceeding should only get costs where they are successful (*Bell et al* 22 January 2010, para. 46) should be rejected for these same reasons.

27. The CalPUC's assessment of an intervener's "substantial contribution" is broader than the brief excerpt quoted by the Applicants appears to suggest.[38] The CalPUC applies the detailed definition set out in the Public Utilities Code Section 1802(i) which provides the following:[39]

> (i) "Substantial contribution" means that, in the judgment of the commission, the customer's presentation has substantially assisted the commission in the making of its order or decision because the order or decision has adopted in whole *or in part one or more factual contentions, legal contentions, or specific policy or procedural recommendations presented by the customer.* Where the customer's participation has resulted in a substantial contribution, *even if the decision adopts that customer's contention or recommendations only in part*, the commission *may award the customer compensation for all reasonable advocate's fees, reasonable expert fees, and other reasonable costs incurred* by the customer in preparing or presenting that contention or recommendation.

28. In a 2002 decision, the CalPUC further elaborated how a party might make a substantial contribution:[40]

> A party may make a substantial contribution to a decision in various ways. It may offer a factual or legal contention upon which the CPUC relied in making a decision. Or it may advance a specific policy or procedural recommendation that the ALJ or CPUC adopted. A substantial contribution includes evidence or argument that supports part of the decision, *even if the CPUC does not adopt a party's position in total*.

29. In practical terms this suggests, for example, that an intervenor who contributes to the factual record upon which the Commission basis their finding is considered to have made a "substantial contribution". However, even this broader interpretation is inconsistent Commission's goals.

30. When first instituted, the objective of cost awards was to ensure that a diversity of interests were represented in Commission proceedings. The Commission noted that "[t]he awarding of costs will in no sense constitute a reflection on the applicant's case, but would simply be a means to ensure that essential points of view can be adequately canvassed in a

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[38] Applicant's Comments, para. 28.
[39] California Public Utilities Code Section 1802(i) <http://www.leginfo.ca.gov/cgi-bin/displaycode?section=puc&group=01001-02000&file=1801-1812> [emphasis added]
[40] Decision 02-03-033 (March 21, 2002), <http://docs.cpuc.ca.gov/word_pdf/FINAL_DECISION/14168.pdf> [emphasis added]

meaningful way."[41] Submissions that contribute to the Commission's understanding of the public interest or improve the record on which the Commission bases decisions, but not explicitly adopted by the Commission are neither frivolous nor irresponsible. Adopting the Applicant's position would effectively shifts the award of costs to an adversarial model explicitly avoided when the procedures were first implemented. Such a shift is unwarranted and undesirable.

iii) Definition of duplication

31. CIPPIC notes that the Taxation Guidelines already refer to duplication between different parties as a factor to consider when assessing costs. The rationale for including this factor as a consideration is closely related to the very purpose of CRTC costs – these are not merit based, but intended to compensate parties only insofar as they have responsibly contributed to an understanding of the issues before the Commission. An organization may have exerted effort on its submissions, and may not have known its efforts were duplicative. Nonetheless, to the extent that its submissions are excessively duplicative of others, it cannot be said to have contributed to the Commission's understanding of the proceedings.

32. But an assessment of duplication must be tied to substance, not merely to duplication of issues. It is not, as the Applicants claim, a "duplication of efforts" that should result in diminished cost recovery,[42] but an excessive duplication of *substance*. The former – duplication of efforts – is in no way tied to the Commission's ultimate goal of gaining a better understanding of the issues before it. In some cases, these issues may be sufficiently complex and multi-faceted that a duplication of efforts will lead to a far more substantive understanding of those issues. In others, this may not be the case. Where duplicative effort leads to a better understanding of the issues at stake, the duplicative effort appears justified. Where it has not, however, it should not be compensated for – regardless of steps taken to reduce such duplication of substance.[43] In each case the ultimate consideration is the degree to which efforts exerted have resulted in a contribution to the proceeding.

[41] CRTC 78-4, p. 123.
[42] Applicant's Comments, at para. 24.
[43] *Ibid.*

33. CIPPIC believes the current rules sufficiently address the need to avoid duplication of substance. The Applicants note that this criteria, while formalized in the Taxation Guidelines, has not been but rarely applied by the Commission in determining costs.[44] CIPPIC submits that this is primarily because there have been few occasions to employ it. A quick survey of costs awards over the past four or five years reveals few proceedings where such duplication is evident. Typically, where there is a major proceeding, one or at most two intervenors will take the lead and make more substantial contributions while others will make more targeted or limited submissions.[45]

34. PN 2008-19 was somewhat exceptional in that regard (but only by CRTC standards) in that three parties felt it was necessary to make substantial contributions. In CIPPIC's opinion, however, this is more indicative of the importance and breadth of the issues raised in that proceeding than of any duplication of substance. Compare this once again to the 9 and 11 intervenors (awarded a total of $2.2 million in two proceedings alone in 1998 at the Régis) that prompted it to put its new rules on duplicative submissions in place. CIPPIC notes additionally that the sentiment, endorsed long ago by the Supreme Court of Canada , that "public participation is a fragile concept, more talked about than realized" remains a reality in Telecom proceedings.[46] Whereas, for example, CalPUC benefited from rigorous participation (valued at over US $100 thousand, on average) from 65 public interest interventions in 2009, CRTC Telecom proceedings produced only 24, with an average intervention rated at about $13,000.

35. As noted above, the onerous expansion of restrictions on duplication advocated by the Applicants might make sense in the context of the two tribunals from which they were primarily drawn, but simply does not with respect to Telecom proceedings. Indeed, in the one recent proceeding where the Applicants have alleged duplication (PN 2008-19), they failed to point to

[44] *Ibid*.
[45] Consumer Groups Comments Appendix 1.
[46] *Bell Canada v. Consumers' Association of Canada,* [1986] 1 S.C.R. 190 (S.C.C.) per Le Dain, J., at para. 16..

any examples of significant overlap in substance between intervenor submissions and were content to merely point to a general affinity of purpose.[47]

36. It is CIPPIC's view that the current rules against duplication, focused as they are on duplication of substance, are more than capable of addressing any abusive duplication. CIPPIC has seen little evidence of a need for the onerous procedures for assessing duplication found that the Applicants borrow from CalPUC.[48] To the contrary, it is CIPPIC's view that the CRTC should more clearly place the onus on costs respondents to prove duplication in substance where they feel this has occurred. They are, indeed, best placed to demonstrate to the Commission precisely why they feel duplication has occurred in a particular proceeding.

e) Any changes must ensure equality between the parties

37. The present costs regime works to ensure the public interest is not eclipsed by the positions of regulated companies. Equal footing is the only way to ensure that the Commission is presented with all facets of the issues before it. Any changes to the present proceedings must not have the effect of tilting the balance in favor of an already strong party; any changes must also recognize the collective strength of the regulated companies in comparison to interveners who represent the public interest. The Applicants suggest that possible cost control mechanisms should be the central focus of the review of cost procedures[49] but the focus of their submission is on shifting the burden to costs applicants and the Commission itself. Although placing caps and monitoring the resources a regulated company expends on a given hearing is not feasible, certain cost controlling measures can maintain the necessary equal playing field. Three such examples are:

a. imposing page restrictions for submissions or time restrictions at hearings on all parties;
b. encouraging both regulated companies and intervenors to file joint submissions to avoid substantive duplication; and

[47] Bell, *et. al.*, "The Costs Respondents Response to Claims for Costs", Telecom Public Notice CRTC 2008-19, September 25, 2009, at paras. 10-11. Indeed, in that submission, the Applicants pointed to evidence of *coordination* in support of their accusations of duplication.
[48] Applicant's Comments, at para. 24.
[49] Application, *supra* note 2 at para. 18.

c. if expert witnesses are restricted or pre-screened, it should apply for both intervenors and regulated companies.

38. Interveners do not operate in a vacuum; their workload is dictated by the submissions of the regulated companies. Regulated companies ought to be discouraged from excessive claims of confidentiality, repetition among similarly minded companies, or other such methods that naturally result in additional submissions on the part of intervenors.

f) Conclusion

39. The current practices and procedures related to the award and payment of costs meet the unique needs and objectives of telecommunications regulation in Canada. This includes the need to encourage intervenors to participate in proceedings to ensure informed participation in public hearings. This review has revealed that while more rigid procedures may be suitable for provincial or state energy regulators who distribute millions of dollars annually to a large number of intervenors; the imposition of similar regimes to the CRTC would offer little benefit. If anything, the proposed guidelines would only serve to dissuade parties from intervening and ultimately frustrate the Commission's mandate.